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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

—
No. 813
—

STEWART L. UDALL, Secretary of the Interior, *Petitioner*

v.

JAMES K. TALLMAN, ET AL., *Respondents*

—
On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit.

—
BRIEF FOR THE RESPONDENTS IN OPPOSITION

—
QUESTION PRESENTED

The petitioner's predecessor in office issued an order on August 2, 1958 making that part of the Kenai National Moose Range in Alaska here in dispute available to oil and gas leasing and requiring a drawing to settle the priority of all conflicting lease offers. Until then, the bulk of the Range, under the order establishing it in 1941 had been withdrawn from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable in Alaska." Respondents made timely application pursuant to the terms of the

August 2 order on August 14, 1958, for ten individual leases of 2,500 acres each. At the drawing held about a year later the respondents were selected as the first applicants for these lands. They were not granted leases, however, because leases covering the same 25,000 acres had already been issued by the Land Office to oil company representatives sometime soon after the order of August 2, 1958 was issued, based on lease offers made in 1954 and 1955. Thus the question arises:

Whether respondents who were the first qualified applicants to file for leases of about 2,500 acres each on lands in the Kenai National Moose Range after those lands were made available for leasing by the Secretary in 1958, are entitled to leases ahead of others who filed lease offers in 1954 and 1955 at a time when the lands were withdrawn by an express Executive Order (No. 8979, December 16, 1941 (6 F. R. 6471)) from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public land laws applicable in Alaska."¹

¹ The respondents presented two other alternate grounds for reversal of the Department's action in this case which the court of appeals did not reach, because of its unanimous decision in respondents' favor on the question stated above:

Whether, regardless of the meaning of the 1941 Executive Order, the Secretary has acted arbitrarily in failing to comply with his own order setting up the specific procedures for determining priority of offers and by according priority to oil and gas lease offers filed in defiance of Departmental suspension orders.

Whether leases issued by the Department on the lands in dispute at rentals of 25 cents an acre were null and void as contrary to Public Law 85-505 of July 3, 1958 requiring payment of 50 cents an acre.

Petitioner's reference in footnote 2, p. 2 to a proposed issue of whether the oil companies are "indispensable parties," which was not raised at any stage below and which he does not ask the Court to consider (Pet. 18), poses no proper question for review (see pp. 23-26 *infra*).

COUNTERSTATEMENT OF THE CASE

Contrary to the broad "consequence" seen by the petitioner, the District of Columbia Circuit made no ruling that all the leases within the Kenai National Moose Range are subject to cancellation. All that the court below decided was that the ten respondents were entitled to individual leases aggregating about 25,000 acres over conflicting applications on the same acreage filed by representatives of the oil companies² which seek to be heard here as amici curiae. In reaching this result the court of appeals had before it all of the specific orders and actions thereunder by the Department dating back to 1941 relating to the Kenai National Moose Range, as well as the Departmental regulations pertaining to wildlife refuges in general. Most of this detailed history is not discussed in the petition despite the clear indication at the outset of the opinion below that this chronology was essential to the decision.³ The major events in sequence may be outlined as follows:

The order of December 16, 1941. President Roosevelt by Executive Order No. 8979 of December 16, 1941 (6 F. R. 6471; Pet. App. 9a) established the Kenai National Moose Range. The special purpose of the withdrawal to protect the unique species of giant Kenai moose was expressly stated in the order as follows:

• • • for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has

² Although referred to as the "Griffin group" by petitioner, the motion for leave to file amicus makes it clear that this group is in fact composed of the major oil companies.

³ Pet. App. 19a. Appendix A of the petition contains an argumentative analysis of the general regulations; not the specific actions and orders.

considerable local economic value, all of the herein-after-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, *withdrawn and reserved* for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose. * * *

After describing all of the lands within the Range, the order excepted only a certain designated portion from closure under the public-land laws:

*None of the above-described lands excepting Tps. 5N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, * * ** *Provided, however, That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: * * ** (Emphasis supplied.)

The Director of the Fish and Wildlife Service commenting on the purpose of the Range prior to its establishment by the President made clear the intent of the order that only the excepted portion would be available for use or disposition under the Alaska public land laws:

* * * The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available

⁴ There is no argument or doubt that the Mineral Leasing Act of 1920, which governs federal oil and gas leasing activity is one of the "public-land laws applicable to Alaska" (Pet. App. 25a). See 43 C.F.R. § 51—Public Land Laws Applicable to Alaska.

for use and disposition pursuant to the public land laws applicable to Alaska. Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale or other disposition under any of the public lands laws applicable to Alaska. (J. A. 62; emphasis supplied.)

All of the lands sought by respondents were within the Range established by this order, but those of respondent Coyle were in the excepted area. The Coyle lands were taken out of the excepted area in 1948 by Public Land Order 487, next described.

The order of June 16, 1948: Public Land Order 487 of June 16, 1948 (13 F. R. 3462; Pet. App. 10a) withdrew some but not all of the lands within the Kenai National Moose Range which the 1941 order left open for use and disposition under the public land laws,⁵ as well as other lands outside the Range.

The general suspension order of August 31, 1953. In 1953 the Department of the Interior undertook a general study of those wildlife refuges, or portions of wildlife refuges which were "otherwise available for leasing" to determine whether such leasing was consistent with the protection of wildlife therein. Pending completion of the study, the Department on August 31, 1953 issued a general order suspending "action on all pending oil and gas lease offers and applications for lands within such refuges." (See J. A. 35.)

As of the date of this order, the Range lands were thus in three categories: (1) a large portion withdrawn from any disposition under the public land laws applicable to Alaska by the terms of the 1941 Executive Order; (2) part

⁵ As noted, the lands of respondent Coyle in the excepted area of the Range were affected by this order. The court of appeals in the light of all the circumstances of the case subsequently discussed found no material difference to exist between the Coyle claim and the claim of the other respondents (Pet. App. 27a-28a).

of the excepted area of the Range, originally left available to disposition and use under the public land laws but withdrawn by the 1948 public land order; and (3) that portion of the excepted area not withdrawn by the 1948 public land order, but suspended by the 1953 order from any action on "pending oil and gas lease offers." This was the status of the lands when the oil company representatives to whom the Anchorage Land Office subsequently granted leases in the present case conflicting with respondents' applications filed their oil and gas lease offers between October 16, 1954 and January 28, 1955.*

The order of September 9, 1955 and its amendment. Public Land Order 1212 issued September 9, 1955 (20 F. R. 6795), revoked in its entirety Public Land Order No. 487 of June 16, 1948. As noted by the court of appeals, (Pet. App. 21a), the order provided initially that a small piece of land (not involved in the present suit) was:

2. Subject to valid existing rights * * * withdrawn from all forms of appropriation under the public-land laws, including the mining, *but not the mineral-leasing laws*, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. * * * (Emphasis supplied.)

The order then proceeded to deal with the remainder of the land restored. After granting preference for homesteading, it provided:

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, *including the mineral-leasing laws*. * * *

* Nine of the conflicting offers were in category (1), and one, contrary to the Coyle offer, was in category (2). The existence of the third, or "suspension" category is relevant to interpreting subsequent orders regarding the Range.

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral-leasing laws.* . . . (Emphasis supplied.)

On October 4, 1955, Public Land Order No. 1212 was amended to delete the provisions for leasing under the mineral-leasing laws appearing in paragraphs 6 and 7 of the order (20 F. R. 7904).

The amended regulations of December 8, 1955. On this date the Department amended its general regulations pertaining to those wildlife areas available for oil and gas leasing, (43 C. F. R. 192.9 (Circular 1945); 20 F. R. 9009; Pet. App. 11a).⁷ The regulation however expressly designated certain areas of the Kenai Moose Range (not involved in this case) as available for leasing only upon approval of a detailed operating program to protect the wildlife. After an operating program had been approved by the Fish and Wildlife Service pursuant to this regulation, oil and gas leases were issued in 1956 for the area within the Range known as the Swanson River Unit. (Tr. 182; Resp. App. B hereto.)

Reimposition of general suspension of leasing in 1956. The Director of the Bureau of Land Management in a general order in 1956 affecting all wildlife refuges or portions of such refuges "remaining open to leasing" (J. A. 36), again suspended all "disposition by lease or otherwise or the granting of any use of such lands."⁸

⁷ These regulations in no way stated, as did the regulations of January 8, 1958, *infra*, pp. 8-9, that they were to apply to all refuges, even to those which by the terms of their withdrawal order were closed to oil and gas leasing.

⁸ The record is not clear as to when the August 31, 1953 suspension order was terminated, or as to exactly when the 1956 suspension order was first imposed. The 1956 suspension apparently continued up until the 1958 orders.

Leases issued prior to 1958. The petitioner lists at pages 10-11 the numbers of leases issued within the Moose Range for various years prior to 1958. However, the petitioner neglects to advise the Court as to the particular status of the lands upon which those leases were issued. A map submitted by the oil companies with their unsuccessful motion for leave to file as amici curiae in the court of appeals shows that all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order, or were in the Swanson River Unit specifically authorized by the regulations of December 8, 1955 (Tr. 146; map reproduced as Resp. App. A hereto).⁹ Other than in these two special areas of the Moose Range, no oil and gas leases were issued for the bulk of lands within the Range, including the lands in dispute here, from the time the Range was created in 1941 until the Land Office action in 1958 here contested.

The general regulations of January 10, 1958 and the Kenai Range order of August 2, 1958. The specific order by which the Range lands involved in this case first became available for leasing was Secretary of Interior Seaton's order of August 2, 1958.¹⁰ This order followed a complete revision of the general regulations issued January 10, 1958 pertaining to all wildlife lands.

⁹ The map shows further that there were offers filed prior to 1958 in the open excepted area of the Range which were not acted upon until after the 1958 order, presumably because suspended by the general suspension orders above noted.

¹⁰ The Secretary conceded below that with respect to this area, no leasing was possible prior to the order of August 2, 1958, but argued that this did not preclude the filing of lease offers prior to the effective date of the January 10, 1958 regulations (J.A. 35, 39). The Secretary further conceded that the Moose Range was closed to oil and gas lease offers between January 10, 1958 and August 14, 1958 (J.A. 37).

The new January 1958 general regulations (43 C. F. R. § 192.9 (1963); Pet. App. 13a) followed a comprehensive examination of *all* wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leasing. It was provided that "no offers for oil and gas leases . . . will be accepted" and "no leases . . . will be issued" on any lands defined as "wildlife refuge lands,"

* * * even though such lands * * * by the terms of the *withdrawal order*, may be subject to mineral leasing. (43 C. F. R. § 192.9 (a)(1); 192.9(b)(1); Pet. App. 13a; 14a; (Emphasis supplied).)

This did not affect the Kenai Moose Range, even though the Range was within the definition of "wildlife refuge land," due to another provision of the regulation expressly authorizing future leasing of lands in Alaska wildlife refuges.¹¹ All Alaska wildlife areas are treated the same under the new regulation whether previously open or closed to oil and gas leasing, with such lands to be available for leasing if, and only if, specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service to protect the wildlife.

Within a few weeks after promulgation of these regulations, the Secretary classified lands in the Kenai National Moose Range for oil and gas leasing, stating in a press release issued January 29, 1958:

I have approved this week classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development . . .

* * * * *

I am assured by Assistant Secretary Leffler that this action *opening a portion of the Kenai range* subject to

¹¹ The 1958 regulations prohibited any leasing or lease offers in all wildlife refuge lands in the continental United States.

the proposed regulated development is entirely consistent with the primary purpose for which the range is managed. (J. A. 16; emphasis supplied.)

This was followed by Secretary Seaton's order of August 2, 1958 (23 F. R. 5883; Pet. App. 17a), which after referring to a consummated agreement necessary to protect wildlife, provided:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing: . . . (Emphasis supplied.)

The lands described as "not opened" involved lands in the southern part of the Range and did not embrace any of the lands involved in this case, which are in the northern part of the Range. The northern lands opened by this 1958 order, embraced both the area originally withdrawn by the 1941 order as well as the excepted area, which the 1941 order left open but on which leasing had been suspended at various times prior to 1958. As to these now opened lands, the August 2, 1958 order provided:

• • • Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

• • •

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined

in accordance with the procedure outlined in the regulation 43 CFR 295.8.¹²

Departmental action in this case. On August 14, 1958 respondents duly filed their respective offers to lease in accordance with the procedure specified in the Secretary's order of August 2, 1958. About a year later; on September 4, 1959, the Land Office held a public drawing pursuant to the provisions of 43 C. F. R. 295.8 (see J. A. 18-24) to determine priorities, as required by the August 2, 1958 order. At the drawing, respondents' lease offers were the first drawn for the lands involved in this case.

Sometime in the fall of 1958, after respondents had filed but without any notice to them, the Anchorage Land Office issued leases for the lands in question to the representatives

¹² 43 C. F. R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. . . .

(b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations.

The salutary effect of these regulations to determine a fair and orderly procedure for treating lease offers is described in *Thor-Westcliffe Development, Inc. v. Udall*, 314 F. 2d 257 (D.C. Cir. 1963), *cert denied* 373 U.S. 951.

of the major oil companies, based on the offers filed by them between October 15, 1954 and January 28, 1955. Assigning this leasing action as its reason, and despite respondents' success in the drawing, the Anchorage Land Office in a decision dated October 7, 1959 notified respondents that their lease offers were rejected.

Respondents appealed the decision of the Anchorage Land Office to the Director of the Bureau of Land Management and from there to the Secretary of the Interior, where the deputy solicitor of the Department decided that the prior action of the Land Office should stand. After a petition for rehearing was denied by the same deputy solicitor, the action below was filed in the District Court. On appeal from a judgment for petitioner, the Court of Appeals in a unanimous decision by Judges Bastian, Miller and McGowan, reversed and granted judgment for respondents (Pet. App. 19a-35a).

REASONS FOR DENYING THE WRIT

- I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE MOOSE RANGE LANDS INVOLVED IN THIS CASE AS CLOSED TO OIL AND GAS ACTIVITY UNTIL THE SECRETARY'S ORDER OF AUGUST 2, 1938, THROUGH EXAMINING THE SECRETARY'S PATTERN OF ADMINISTRATION THEREOF AND FROM CONTROLLING LAW.**

The petitioner does not attack the decision of the court of appeals below on the ground that it is in conflict with the decision of another court of appeals, or with applicable decisions of this Court, or that it deprives him of any important general regulatory powers,¹³ but seeks review solely on the narrow ground that the court's construction of the 1941 Executive Order is inconsistent with an asserted administrative construction within the Department. A unanimous court had no difficulty in rejecting this contention.

¹³ The petitioner concedes that he now possesses the power to change the terms of any outstanding Executive or Public Land Order (Pet. 15, n. 24).

A. The administration of the Range is consistent with the holding below.

Petitioner says his interpretation is right and the D. C. Circuit is wrong, because it is his interpretation; and has been given "extensive practical application" (Pet. 10-14). We set forth in our counterstatement of the case the chronological action of the Department regarding the Kenai Range since its creation in 1941 to show that contrary to the petitioner's statement, the variety of orders specifically pertaining to the Range as well as their interrelationship with the various amendments to the general regulations concerning wildlife refuges, must be read consistently with the clear language of the 1941 Executive Order as precluding oil and gas leasing activity on the lands involved in this case.¹⁴ The Departmental actions demonstrate this. Thus, no leases were issued within the Kenai Range between 1941 and 1958 (except on lands in the open excepted and special areas not involved in this case),¹⁵ and none of the orders and regulations pertaining to the Range prior to the express order of August 2, 1958 gave any indication that the bulk of the lands in the Range, including those involved in this case, were open to oil and gas leasing. Only this view is consistent with the basic primary purpose of the Moose Range to protect—

• • • the natural breeding and feeding range of the giant Kenai Moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for study in its natural environment of the practical management of a big game species that has considerable local economic value. • • • (Executive Order No. 8979 of December 16, 1941, 6 F. R. 6471; Pet. App. 9a)

¹⁴ Some of the Department's interim actions regarding this Range may be ambiguous, but to the extent that different meanings are asserted they become hopelessly confused and conflicting.

¹⁵ See *supra*, p. 8 and *infra*, pp. 14-15.

Until the detailed agreements between the Bureau of Land Management and Fish and Wildlife Service had been worked out and published pursuant to the order of August 2, 1958 for the protection of the basic purposes of the Range, oil and gas leasing activity of any sort within the closed area of the Range was not intended.¹⁶ Even then the southern part of the Range was to remain closed. Respondents who thereafter acted in full compliance with the August 2, 1958 order and were selected as the first qualified applicants thereunder in the official drawing, were obviously prejudiced by the attempt to justify the Land Office's issuance of leases to the oil company representatives through the Department retroactively declaring the entire Range open to application prior to 1958. The close study given the detailed facts of this case by the court of appeals amply justified its conclusion that:

*** Deference to agencies does not reach the extent of sanctioning irrational agency action, however, nor does it permit an agency to frustrate judicial review by issuing a series of confusing and possibly conflicting orders, and then urging that the agency's resolution of the confusion and conflict is not unreasonable since no resolution of such confusion could be called unreasonable. In the case before us the Secretary's interpretation of the 1941 order seems to us unreasonable and should not stand. (Pet. App. 28a)

The petitioner relies on the fact that some leases were issued for lands within the Kenai Moose Range prior to 1958 and that this was known to the House Committee on Merchant Marine and Fisheries in 1956 and considered in the Alaska Submerged Lands Act (Pet. 12-13). This is

¹⁶ Certainly the petitioner's concession that the Range lands here involved were closed to lease offers after the January 1958 regulations until the agreement was worked out and published in the August 2, 1958 order (J.A. 37) is difficult to reconcile with his attempt here to uphold speculative offers filed long prior thereto when there was no regulatory machinery for leasing these lands.

a total irrelevancy because of the actual location of these leased lands within the Range, not shown in the petition (discussed *supra*, p. 8), i.e. either in the excepted area of the Range expressly left open by the terms of the 1941 order or in the Swanson River Unit specially authorized by the December 8, 1955 regulation. There was no misunderstanding on the part of respondents, the petitioner, or the court of appeals below that the issue before it did not involve these lands leased before 1958 but only the status of the lands involved in this case, which were never subject to leasing prior to August 2, 1958.¹⁷

B. The Range was closed under the plain meaning of the 1941 order and under the construction of similar language by the courts.

The court of appeals ruled that the 1941 Executive Order creating the Kenai National Moose Range "clearly did remove the land involved from oil and gas leasing" (Pet. App. 25a). This correct result was predicated in large part on the broad language of the order restricting the land against any "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska . . ." In 1941, as well as today, there was no doubt that the Mineral Leasing Act of 1920 as amended was one of the public land laws

¹⁷ Secretary Seaton's 1958 press release announcing the opening of the bulk of the Kenai Moose Range expressly stated:

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, * * * (J.A. 16; emphasis supplied; see *supra*, p. 9)

The action of the court below shows that it was under no misapprehension either in unanimously deciding the case (Pet. App. 23a-24a, fn. 8), or in unanimously rejecting motions and briefs filed after the decision by the oil companies urging their participation as amici in a proposed rehearing (Tr. 183).

applicable to Alaska. The Secretary's regulations expressly so provide.¹⁸

The petitioner's attempt to construe the language of the order as limited to instances where the Government parts with title to the land was thoroughly considered by the court below and found inconsistent with other language of the order such as that specifically exempting fish trap sites which are acquired not by deed but by a license, similar in many respects to a lease. In addition, the language pertaining to the excepted area of the Range, which was left open to "*use and disposition . . . pursuant to the public land laws applicable to Alaska*" makes it quite clear when read in *pari materia* with the preceding language in the order that there was to be no such "*use*" of the closed area involved in this case.¹⁹

The petitioner's effort to overcome the clear meaning of the language of the order by reference to some random administrative decisions within the Department was properly rejected below. None of these decisions construed language identical to that of the 1941 Executive Order involved, and even assuming them to be in point, they are completely without value because contrary to prior decisions by this Court and other federal courts.

In *Kinney Coastal Oil Company v. Kieffer*, 277 U.S. 488, 490-491, 504 (1928), this Court ruled that the Mineral Leasing Act of 1920:

* * * relates particularly to the *disposal* of oil, gas and other designated mineral deposits in the lands of the United States, * * * In the main it provides

¹⁸ See 43 CFR § 51—Public Land Laws Applicable to Alaska; 43 CFR § 71.1—Mineral Leasing Laws and Regulations Applicable in Alaska.

¹⁹ This portion of the Executive Order, omitted in Pet. App. 9a-10a, is set out *supra*, p. 4.

that the *disposal* of such deposits shall be through leases * * * (p. 491; emphasis supplied.)²⁰

The Mineral Leasing Act itself in Section 17 provides that "all lands subject to *disposition* under this Act which are known or believed to contain oil and gas deposits . . . may be leased by the Secretary of the Interior" (30 U. S. C. § 226(a).)

Under the Pickett Act of June 25, 1910. (36 Stat. 847; 43 U. S. C. § 141), Congress authorized the President to "withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska . . ." In 1929 the President and Secretary relied on the Pickett Act to close the public lands to oil and gas leasing under the Mineral Leasing Act of 1920. A challenge to the effectiveness of the language used in the Pickett Act to permit a withdrawal of lands from leasing was expressly rejected by the District of Columbia Circuit in *Wilbur v. United States ex rel. Barton*, 46 F. 2d 217, 220-221 (1930), as follows:

* * * But it is insisted that the act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and the lease which may follow discovery of oil under the act of 1920 are not embraced within those terms. *It is apparent, we think, that the act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.*

Under the act of 1920, the applicant for a permit was required to locate and designate the lands sought

²⁰ This decision, although not before the court of appeals below, completely disposes of the petitioner's alleged administrative construction centered on the contention that a lease is not a "disposition."

in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. *This, we think, was akin to location or entry, as used in the act of 1910.* (Emphasis supplied.)

This Court affirmed, 283 U.S. 414, 419 (1931).

In another case decided just five years prior to 1941, this Court again confirmed its interpretation of general language similar to that used in the 1941 order, as withdrawing lands containing oil deposits from rights granted by § 20 of the Mineral Leasing Act of 1920. *Bordieu v. Pacific Western Oil Co.*, 299 U.S. 65 (1936): The lands in question had been withdrawn by the President on December 30, 1910 "from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting use and disposal of petroleum lands." The Court held as follows:

The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925. . . . The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were "withdrawn from settlement, location, sale or entry and reserved for classification . . ." Whether a "classification" of the lands was affected by the order we need not determine since it is clear that they were "withdrawn" by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privilege of the Act of 1920 that the lands were either withdrawn or classified. * * * (299 U.S. at 69-70.)

Thus, in 1941 when the President issued Executive Order No. 8979 establishing the Kenai National Moose Range as a wildlife refuge, the words he employed had become well established under the existing decisions of the courts interpreting similar withdrawal orders; in every case it had

been held that the language withdrew and closed the lands to activity under the mineral leasing laws. Despite the petitioner's straining, this law and the plain meaning of the language used creating the Range uphold the ruling below that the Range lands were closed until opened to offers to lease by the express order of the Secretary of August 2, 1958.²¹

II. THE COURT OF APPEALS DECISION AFFECTS ONLY THE RIGHT TO TEN LEASES WITHIN THE KENAI MOOSE RANGE IN ALASKA.

The Departmental regulations of January 8, 1958 have made it clear that all wildlife refuge lands in the United States except those in Alaska are closed to oil and gas leasing "even though such lands . . . by the terms of the withdrawal order, may be subject to mineral leasing" (43

²¹ Petitioner's attempt (Pet. 8-10) to find an administrative construction of the words used in the 1941 order is fruitless. The Solicitor's 1921 opinion at 48 I.D. 459 (upon which Mr. Hoffman apparently relied) interpreting the words "or other disposal" in a reservation from "entry, location or other disposal" as limited to things akin to "entries" or "locations" was in substance overruled by this Court's decision in 1928 in *Kinney Coastal Oil Company v. Kieffer*, *supra*. In 1948 the Department itself did not follow the 1921 opinion when it rejected lease offers on lands in Alaska withdrawn by Executive Order No. 5214, of October 30, 1929 "from settlement, location, sale or entry." *D. Miller*, 60 I.D. 161 (1948). Subsequently, however, the Department in the *Teuscher* case, 62 I.D. 210 (1955) (decided *after* the conflicting offers in the present case had been filed), reversed the holding of *D. Miller* re the effect of the language of Executive Order No. 5214. But even the *Teuscher* case, which made no mention of this Court's authoritative construction in the *Barton* case, *supra*, of the same words in the 1910 Pickett Act, is not in point. The Executive Order there merely withdrew the lands "from settlement, location, sale or entry." Quite different is the order creating the Kenai Moose Range, which withdrew the land from "settlement, location, sale or entry; or other disposition (except for fish trap sites) . . ." Thus, with such language, leasing could be permitted only on any lands expressly excepted under the order.

C. F. R. 192.9(a)(1), 192.9(b)(1) (1963); Pet. App. 13a, 14a; see also Pet. App. 4a).²² Thus the decision below construing the meaning of the 1941 Executive Order creating the Kenai National Moose Range can have no conceivable relevance to any other wildlife refuges except those in Alaska. With respect to Alaskan wildlife refuges which the 1958 regulations provide may be available for oil and gas leasing, the petitioner concedes that only the Kenai refuge has any present importance for oil and gas (Pet. 5).²³

Within the Kenai National Moose Range, the judgment of the court of appeals directly affects the right to only ten leases sought by the individual respondents for 2,500 acres each. To respondent's knowledge there has been absolutely no drilling or actual production of any oil or gas by the adverse oil company lessees on any of these ten leases.²⁴

Nevertheless, petitioner asserts that the decision below goes beyond the relatively few leases before the court, making "all the leases on the Kenai Range . . . subject to cancellation by the Secretary" (Pet. 5). But petitioner does not say cancellation of all the leases beyond the ten involved is required, nor do the oil companies, nor, indeed,

²² Unless leasing is necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

²³ The decision below could not pose any hardship on the Secretary with regard to any future oil and gas leasing in other Alaskan areas or elsewhere because the Secretary possesses full power to change or revise the terms of any withdrawals of public land. Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831).

²⁴ Some of the 25,000 acres have been included with other lands on which wells have been drilled in a unit agreement.

The complete lack of drilling activity on the lands involved in this suit while proceeding on adjacent lands, is a curious coincidence in the light of the oil companies' assertion that they had no knowledge of this suit (Amici brief, p. 12).

did the court below. There are several reasons why this result does not follow.

First, the decision below rests on a determination as to which of two conflicting applicants for the respective leases should prevail, pursuant to the mandate of Section 17 of the Mineral Leasing Act (30 U.S.C. § 226) requiring the issuance of a lease to the first qualified applicant. There is absolutely no showing that for any of the leases other than those involved in this case, there were any conflicting lease applications pending, so as to require a determination as to which application under the circumstances was first qualified. Certainly the court of appeals has made no determination of the completely different case that would be presented where there was just one offer pending to lease particular lands. In such a case any infirmity in the lease offer might well be considered moot or unimportant to the validity of the lease.

Second, even if it were shown that there were conflicting applications for each of the 433 leases, this does not necessarily mean that those outstanding leases are subject to cancellation in the absence of a timely appeal by the rejected applicant. The Mineral Leasing Act expressly provides:

No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter. * * * (30 U. S. C. § 226-2.)

Except for the case sought to be reviewed here, we are aware of no actions by any persons who may have filed conflicting offers prior to the issuance of the 433 leases, which seek to challenge the issuance of those leases.

Third, in the absence of any appeals by adverse lease applicants, the question whether the Secretary may *sua sponte* cancel outstanding leases would present an entirely

different case. The issue there would be whether leases issued under an erroneous construction of law, not contested by counter-applicants for leases, are subject to retroactive invalidation. That this different situation may well not require cancellation is now well established. *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962); *cert. denied* 371 U.S. 901.

The petitioner further argues that the case should be reviewed by this court to prevent a multiplicity of litigation (Pet. 6), presumably to be brought by the oil companies. As respondents point out in discussing the so-called "indispensable party" issue,²⁵ the oil companies, whose representatives were parties to the administrative proceedings, knew or should have known of respondents' action for judicial review against the Secretary, but declined to seek intervention therein.²⁶ While thus having assumed the role of a nonparty to the litigation, the oil companies nevertheless sought to litigate their case by detailed briefs on the merits urging rehearing in the court of appeals, and now urge certiorari here, all under the garb of "amici curiae." Even if after this history the oil companies should refuse to abide by the decision below²⁷, a threat of further litigation provides no valid reason for now reviewing the judgment below. Certainly the speculation that some case may be brought in some court at some future time resulting in some ruling conflicting with that of the court of appeals

²⁵ *Infra*, p. 25.

²⁶ The right of a lessee to intervene in a suit for judicial review against the Secretary by an adverse claimant for the lease is well established. See *Safarik v. Udall*, 304 F. 2d 944, 948 (D.C. Cir. 1962), *cert. denied* 371 U.S. 901; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 218 (1938).

²⁷ In no other instance that we can find has the disappointed lessee, even though not a party to the review proceedings, refused to abide by a judgment against the Secretary rendered by the District of Columbia Circuit.

below, provides no occasion for this Court to now exercise its certiorari powers. Should such a future conflict actually arise, then this Court could be presented with a cognizable basis for its certiorari jurisdiction, under its Rule 19.

III. THERE IS NO INDISPENSABLE PARTY ISSUE WARRANTING REVIEW BY THIS COURT.

Petitioner's concession that he did not raise the so-called indispensable party issue in the court of appeals below, nor does he desire to have this Court pass on the question (Pet. 17-18), should bar its consideration now. *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *California v. Taylor*, 353 U.S. 553, 557, n. 2 (1957).

Even if properly before the Court, the contention poses no issue warranting review.

A. The oil companies are not indispensable parties.

It is now well established that lessees are not indispensable parties to a suit against the Secretary for judicial review of Departmental errors in issuing such leases under Section 17 of the Mineral Leasing Act. The District of Columbia Circuit in a unanimous decision by Judges Bazelon, Edgerton and Fahy, squarely so held in *Barash v. Seaton*, 256 F. 2d 714, 718 (1958), from which the Secretary sought no review by this Court.²⁸ The *Barash* decision cited this Court's decision in *Work v. Louisiana*, 269 U.S. 250, 254-255 (1925), which distinguished the old cases cited by petitioner and amici. And in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 300 (1902) this Court held that proposed lessees of oil lands need not be joined in a suit against

²⁸ For a similar result see *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955) where the court ordered a lease issued by the Secretary in violation of his own regulations to be set aside regardless of the absence of the lessee (Culbertson) as a party to the judicial review proceedings.

the Secretary to restrain him from leasing oil lands held for the benefit of Indians.

The *Barash* case is alone consistent with this Court's decision last term in *Boesche v. Udall*, 373 U.S. 472 (1963), ruling that the Secretary of the Interior is possessed of administrative authority to cancel oil and gas leases on public lands for invalidity at their inception:

• • • We hold • • • that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land. (373 U.S. at 485)²⁹

The petitioner's further suggestion that the present review proceedings must be dismissed for lack of the oil company lessees because the oil companies may seek to challenge the D. C. Circuit's holding by a new review action in the Ninth Circuit "(in a proceeding in which the respondents similarly were not made parties)" (Pet. 19), is patently fallacious.³⁰ What the petitioner is in effect saying is that his erroneous decision in this case is not subject to judicial review. In any event even if it be assumed that the oil companies may collaterally attack the judgment of the D. C. Circuit below (*cf. City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1957)), petitioner's

²⁹ In *Boesche* only one of the "competing applicants for the same land" was before the courts. Cuccia and Conley, the adverse applicants to whom the Secretary had deferred the issuance of a lease and the cancellation of *Boesche's* lease, were not parties to the judicial review proceedings.

Under the Departmental practice notice to the lessee is not a condition precedent to administrative cancellation, although the lessee may appeal to the Secretary. *Seaton v. The Texas Co.*, 256 F. 2d 718, 721 (D.C. Cir. 1958).

³⁰ If the oil companies are free to bring such a new action, then *a fortiori* they are not indispensable parties to the present action.

speculation as to the nature and outcome of a hypothetical future suit by the oil companies obviously provides no basis for this Court to exercise its certiorari powers at this time. To the contrary, only when and if there are conflicting Circuit Court decisions would review be appropriate.

While the law is clear that the oil companies are not indispensable parties, the precise position of the oil companies seeking to file as amici vis-a-vis the present litigation should be noted.

B. The oil companies voluntarily declined to intervene as parties to the judicial proceedings below.

Each of the persons having an adverse interest in the leases involved in the present case was advised by certified mail as "adverse parties", pursuant to Departmental procedures, of all of the administrative proceedings within the Department by respondents challenging the issuance of leases in disregard of their pending lease offers.³¹ In particular, respondents' petition to the Secretary (J. A. 41-60) challenging the issuance of the leases on similar grounds to those subsequently adopted by the court of appeals, was mailed to each of these persons and proof of service was made to the Department (Tr. 177-180). The oil companies knew of the Department's decision of April 25, 1962 denying this petition. (Tr. 181.) The present suit for review was filed 44 days later on June 8, 1962 in the only court in the United States then having jurisdiction of such an action against the Secretary of Interior, namely the United States District Court for the District of Columbia,³² within the 90 day period specified by Congress for the initiation

³¹ The oil companies admitted in the court of appeals that they had notice of the administrative proceedings.

³² 62 Stat. 935 (1948), 28 U.S.C. § 139 (1958); *Thomas v. Union Pac. R.*, 139 F. Supp. 588, 596-97 (D. Colo. 1936), *aff'd per curiam* 239 F. 2d 641 (10th Cir. 1956).

of such suits.³³ Jurisdiction over the oil company representatives in that court was not possible. The oil companies could have petitioned to intervene in the proceedings in the District Court as parties,³⁴ but did not.³⁵ When abstaining nevertheless brought an adverse result in the D. C. Circuit the oil companies sought to be heard as amici in urging rehearing. Similarly they seek to litigate the merits of the case now in this Court, urging that no review of the Secretary's erroneous action is possible because they are indispensable parties. Under these circumstances, respondents submit that this Court, as did the court of appeals below (Tr. 183), should dismiss the motion of the oil companies to file an amici curiae brief in this proceeding.

³³ 30 U.S.C. § 226-2. Public Law 97-478, 76 Stat. 744 (1962), 28 U.S.C. §§ 1361, 1391(3) (Supp. 1962) permitting suits against the Secretary in other jurisdictions was not enacted until October 5, 1962.

³⁴ See *Safarik v. Udall*, 304 F. 2d 944, 948 (D.C. Cir. 1962), cert. denied 371 U.S. 901; cf. *Consolidated Edison Co. v. NLRB*, 350 U.S. 197; 218 (1938).

³⁵ The oil companies' claim that they had no knowledge of the judicial proceedings (Amici Motion, p. 12) when there was only one court where such could be brought strains credulity, in view of their expressed interest in these lands. But the point is immaterial, for they in any event could have known of the judicial proceedings which were a matter of open, available public record. Likewise there was presumably a choice. By not participating the issue might be cast simply as the Tallman group versus the Secretary. By participating the case could fall in the less favorable category of the Tallman group versus the oil companies:

• • • Moreover, the Secretary's latitude is not the same in all circumstances. When the controversy is fundamentally between two private interests, . . . his discretion is not as great as when the controversy is between private interests on one hand and the Secretary "as guardian of the people", on the other, . . . The law is not blind to such distinctions. (*Seaton v. The Texas Company*, 256 F. 2d 718, 722 (D.C. Cir. 1958).

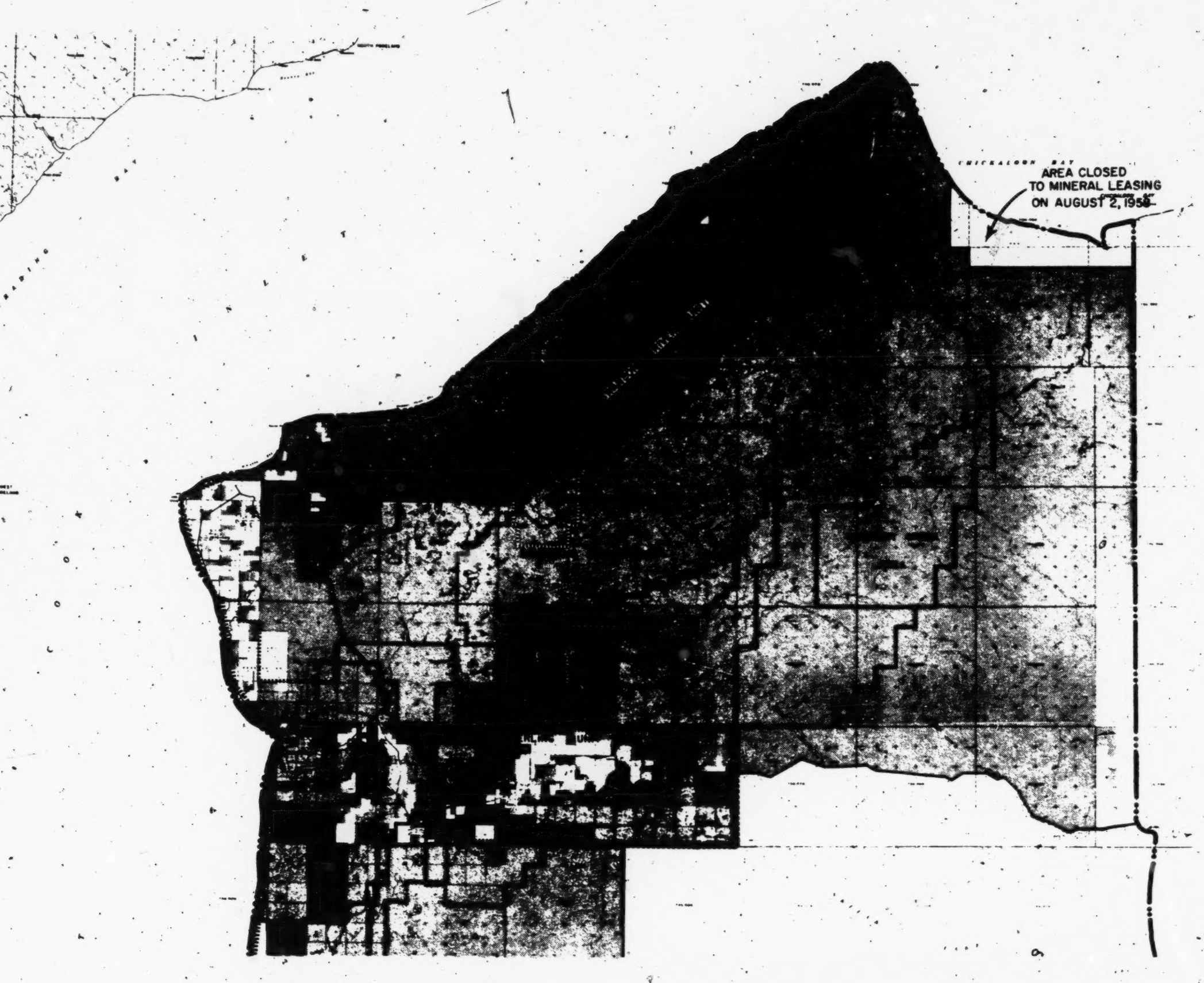
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, as should the motion for leave to file a brief amicus in support thereof.

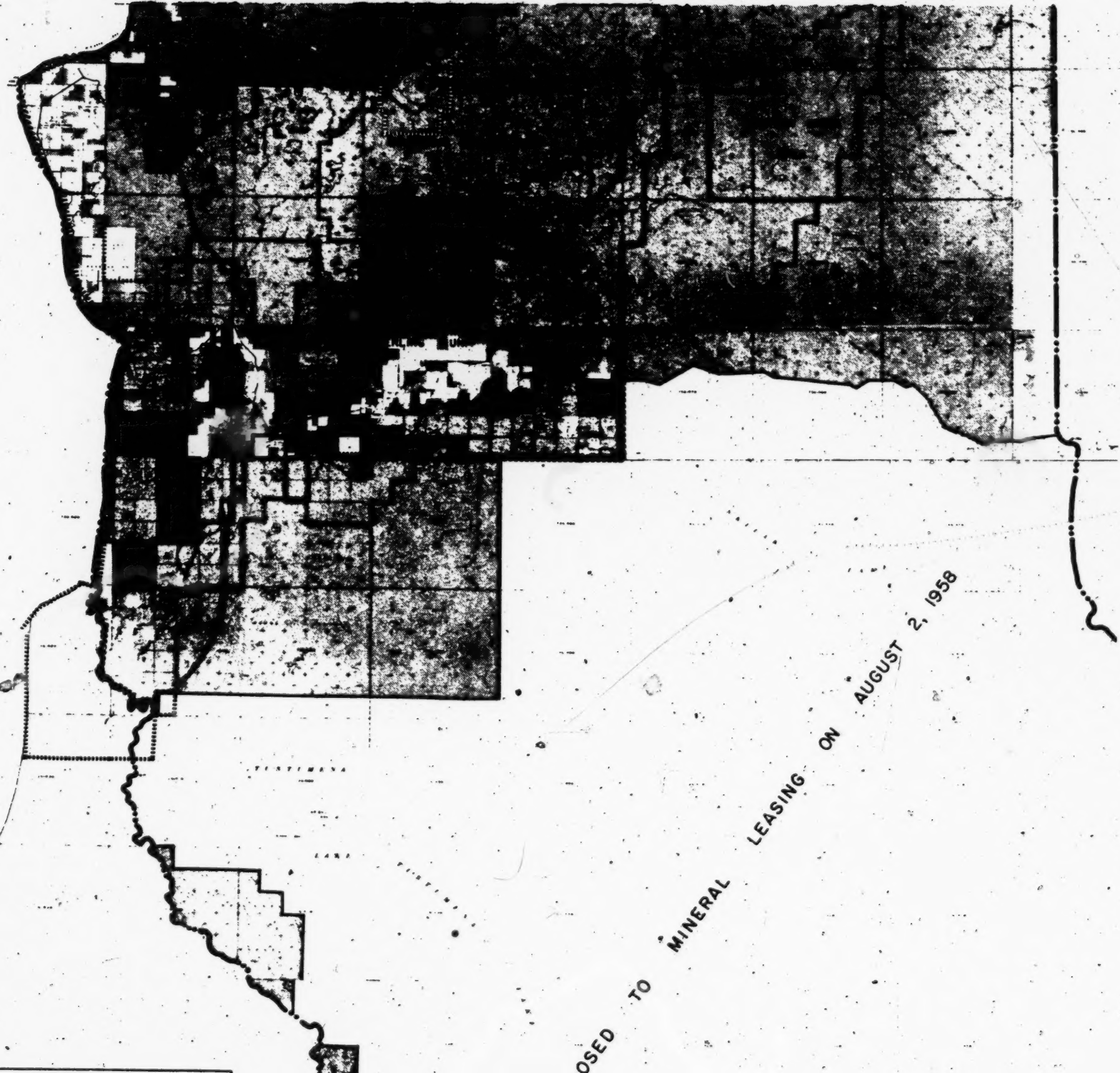
Respectfully submitted,

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Counsel for Respondents

March 11, 1964



MICHALOON BAY
AREA CLOSED
TO MINERAL LEASING
ON AUGUST 2, 1958



CLOSED TO MINERAL LEASING ON AUGUST 2, 1958

LEGEND

----- KIMAI MOORE RANGE, EXECUTIVE ORDER NO. 8979
DECEMBER 16, 1941

----- RECEIVED FROM EXECUTIVE ORDER NO. 8979

----- WITHHELD BY PUBLIC LAND ORDER 437
RECEIVED BY PUBLIC LAND ORDER 1212
BUREAU GEOLOGICAL SURVEY (U.S.G.S.)

----- LAND LEASED PURSUANT TO OFFERS MADE PRIOR TO
AUGUST 14, 1958 AND ISSUED AFTER SEPTEMBER 1, 1958
APPROX. 704,000 ACRES

----- LAND SUBJECT TO TALLMAN GROUP OFFERS

----- LEASES ISSUED PRIOR TO AUGUST 2, 1958
APPROX. 129,000 ACRES

* PRODUCING GAS WELL

o WELL LOCATION SURVEY UNIT

0 5 10
SCALE IN MILES

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 1958

RESPONDENTS' EXHIBIT B

Aug 7 - 1956

MEMORANDUM

To: Director, Bureau of Land Management

From: Director, Fish and Wildlife Service

**Subject: Kenai National Moose Range—Operating
Program—Richfield Oil Corporation**

In accordance with the provisions of 43 CFR 192.9 (Circular 1945) an operating program has been approved by this Service, copy attached, for operations in the Swanson River Unit Area, Territory of Alaska, under Contract No. 14-08-001-2969 that was approved by the Geological Survey on July 31, 1956.

Oil and gas leases may be issued for the lands of the Kenai National Moose Range that are included within the said unit area, provided the lessees comply with the requirements of the operating program.

(SGD) JOHN L. FARLEY

Attachment